No. 3877

United States Circuit Court of Appeals

NINTH CIRCUIT

WILLIAM KLEIN, ET AL.,
Appellants,

VS.

CHARLES PETER, ET AL.,
Appellees.

Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

BRIEF AND ARGUMENT OF APPELLEES.

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STATEMENT OF THE CASE.

The solicitors appearing here for the Appellees represented only two defendants in the lower court, namely: The Mascot Mining and Milling Company, Limited, of Idaho, and the defendant, J. M. Stevens.

In this action brought originally in the United States District Court, District of Idaho, Eastern Division, the defendants Mascot Mining and Milling Company, Limited, of Idaho, and J. M. Stevens and R. E. Roser were

served with process, but service of subpoena was not made on any of the other defendants named in said cause. (No return of the service of subpoena is contained in the transcript of the record). This case was filed on June 24th, 1921, at a time when a similar case, numbered 263, with the same complainants and the same defendants was pending in the same court. The present case in the United States District Court for the District of Idaho was numbered 307, and the copy of the complaint filed in this case is the same as the complaint filed in 263, and in which there is no material change or additional allegations. The defendants, the Mascot Mining and Milling Co., Ltd., of Idaho, and the defendant, J. M. Stevens filed their motion to strike and to dismiss the bill of complaint. The motion on behalf of the Mascot Mining and Milling Company (See transcript, Pages 74-77) charged an insufficiency of fact to constitute a cause of action against this particular defendant as well as the fact that under the State court action, the District Court of the Fifth Judicial District of the State of Idaho, Bannock County, had entertained a suit against the Mascot Mining and Milling Company, Limited, and that out of that action a receiver had been appointed. That the receiver had taken possession of all of the property, both real and personal, belonging to the Mascot Mining and Milling Company, Limited, and which receiver was in possession of said Mascot Mining and Milling Company, Limited, of Idaho, at the time suit No. 307, in equity was filed. For the further reason that case No. 307 in equity was to all intents and purposes and in substance, the same as case No. 263 in equity.

The motion on behalf of J. M. Stevens to strike plaintiffs complaint (see transcript pages 77-80) was that the complaint had not been brought in good faith; that a receiver had been appointed by the state court as affirmatively shown in complainants bill of complaint, and the state court had taken exclusive possession of the defendant corporation the Mascot Mining and Milling Company, Limited, of Idaho. Also that the complainants did not have legal capacity to sue on account of the defendant corporation, the Mascot Mining and Milling Company, Limited, of Idaho, having been placed in the hands of a receiver and this receiver being in charge at the time this action was brought, and that he was the only party that could maintain a suit against the directors or against the corporation. Also that no demand had been made or any request had been made upon the receiver of the State court to institute any action similar to this one stated in the bill of complaint. Also for the further reason that the Federal Court had no jurisdiction because of the prior jurisdiction in the state court.

The motions on behalf of the Mascot Mining and Milling Co., Ltd., and on behalf of J. M. Stevens, were argued and submitted to the court at same time and thereafter the court's order was to the effect that complaint in equity No. 307 should be and was dismissed. (See transcript p. 80-81). At the time the trial court sustained the motions of the defendants, the Mascot Mining and Milling Company, Limited, of Idaho, and J. M. Stevens, no application was made to the court for permission to

amend or to file a supplementary complaint asking leave to make the receiver a party either as complainant or as a defendant. That while the complainants knew that the receiver had been appointed in the state court action, yet there was no application to the state court for an order directing the receiver to bring such a suit as stated in appellants' bill of complaint, nor was there any request by complainants or complainants' attorneys of the receiver that he institute an action such as stated in complainants bill. And it does not appear in complainants bill of complaint in equity No. 307 that such a request was ever made of the receiver, nor does it plead any fact by which the court could understand that the receiver had refused or declined to bring any such action. Nor does it appear that the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County, ever refused to the complainants an order directing the receiver to bring such a suit. The bill of complaint nowhere attempts in this instance to plead facts which would excuse the complainants from a strict compliance with equity rule 27 of this court.

The trial court, after considering the arguments on the motions made by the defendants, the Mascot Mining and Milling Co., Ltd., and J. M. Stevens dismissed said action on Oct. 10, 1921, allowing exceptions to such order, and on March 30, 1922, the court entered a final decree dismissing complainants bill No. 307 in equity. (See transcript pages 80-81).

The bill of complaint does not show a compliance with

equity rule 27 in requesting or demanding action by the board of directors of defendant corporation.

In the transcript of the record on page 64 it shows that one G. Adolf Lobner intervened in the state court action where Ferdinand Walther was plaintiff and the Mascot Mining and Milling Company, a corporation, was defendant, in which action E. S. Sloane was appointed receiver. The complaint in intervention in that case was in substance and fact identical to bill of complaint No. 307 in equity filed in the United States District Court for the District of Idaho, and the attorneys representing the complainants in equity case No. 307 were the same attorneys who appeared in the state court on behalf of G. Adolf Lobner, intervenor. On page 65 of the transcript Ross W. Bates appeared in the state court action and on behalf of the intervenor in that action moved to dismiss the complaint in intervention. There is, however, an error on page 65 of the transcript wherein it reads that Ross W. Bates moved to dismiss the complaint in intervention filed by the receiver. The word "receiver" in this instance should be read as intervenor.

This brief and argument is presented on behalf of the defendants, the Mascot Mining and Milling Company Limited, and on behalf of the defendant, J. M. Stevens:

BRIEF AND ARGUMENT

The principal question involved in the hearing before this court is whether or not the complainants' bill in equity No. 307, stated facts sufficient to constitute a

cause of action in favor of the complainants either at law or in equity. Also the question whether the complainants had legal capacity to sue as they did in equity case No. 307.

In the appellants' brief much is said as to equity rule 27 and its application to the present case before this court. It would serve no useful purpose to set out equity rule 27 in its entirety, but the substance of that rule is that where the directors of a corporation are guilty of mismanagement or do any act which is contrary or against the interests of the corporation, that the stockholders may proceed by a suit where the appeal to the directors would be unavailing. In pleading a case under equity rule 27, it is incumbent upon the complainants to show that they have either demanded or requested officers in charge of the corporation to desist from causing injury to the corporation or that facts must be pleaded which show an excuse for not complying with the strict letter of this equity rule. It will be remembered in this case that prior to the time equity case No. 307 was filed by the complainants, a suit had been instituted in the state court in Idaho in which one of the directors brought suit to recover money due to him from the corporation, and in that case on his application a receiver was appointed by the state court, and which receiver took charge of all of the assets being the real and personal property belonging to the Mascot Mining and Milling Company, Limited, of Idaho, as well as all books and records, office furniture and fixtures, and of the office of said defendant company. That upon the re-

ceiver so appointed qualifying and taking charge of the business of the Mascot Mining and Milling Company, Limited, of Idaho, the officers and directors were displaced from any authority or any control whatsoever over the business or affairs of said defendant company, and from the appointment of the receiver he alone, under the direction of said court appointing him, had, subject to the order of that court, the full control of the defendant corporation.

Counsel for the appellant in the brief filed on behalf of the appellants pays little or no attention to the fact that a receiver had been appointed by the state court, and apparently assumes that there is no distinction or difference between cases wherein the corporation is in the hands of a receiver, and cases wherein the corporation is managed, directed and controlled by its own officers, but there is a vast distinction in these cases. Where the corporation is directed by its officers, and they refuse to take any action to redress any wrongs done to the corporation, or where they refuse to change the policy of the corporation where the same is being mismanaged, the stockholder is entitled to go into court under equity rule 27 and present the facts to the court, and if he has plead facts which entitles him to maintain his action under equity rule 27, the court will render assistance, and even in this connection he must show a compliance with equity rule 27 or plead facts under which he established excuses, but where there is a receiver appointed by a court of competent jurisdiction the situation is altogether changed. In bill of complaint

No. 307, the complainants do not charge any fraud on behalf of the state court in the appointing of a receiver to take charge of the defendant corporation, the Mascot Mining and Milling Company, Limited, of Idaho, and in the absence of an allegation the receiver is presumed to be impartial, that he is anxious and desirious as an officer of the court to enforce all of the rights of the corporation, to manage and control the same and to bring such actions as are necessary for the good of the corporation. He is an officer of the court and his act as receiver must, under the laws of Idaho, be approved and be acceptable to the court. If it should be determined that a receiver has been appointed through fraud or that he has been appointed at the instance of directors who are seeking the destruction of the corporation, then it is the duty of whomsoever is grieved by such action, and if he be a stockholder he may go into the court responsible for the appointment of such receiver and ask his removal. If he is satisfied that fraud existed by which the receiver came into being he must act promptly, and also he may go into the same court and get his order from the court requiring the receiver to bring an action on behalf of the corporation. The complainants in this case knew of the state court's action and knew that they were welcome at any time to intervene in that action and one G. Adolf Lobner who claimed to be a stockholder of that defendant company, intervened and filed in that court a complaint in intervention similar to the one being considered, and being represented by the same counsel who appear for the appellants

in this case. No reason is shown why the complainants here, after the dismissal of equity case No. 263 and prior to the filing of equity case No. 307, did not go into the state court and ask leave to intervene or ask leave to set aside the state court receiver, and without asking leave of the state court for an order requiring the receiver to bring an action there on behalf of the corporation and its stockholders. What would have been done upon such a request cannot here be said nor can it be assumed that the state court was or is a party to any alleged fraud or that the state court would have sanctioned the receivership proceedings if it had known of any fraud in the matter, or that it would have denied to the complainants an order to the receiver to bring such suit. Again, too, it cannot be said that the state court was being directed, influenced or controlled by the defendants, or any of them, and no showing is made at all in the complaint why the complainants did not seek an order of the court requiring the receiver to sue or why the complainants did not request the receiver to bring such action. Under the order of the state court appointing the receiver, its receivership was not one qualified or limited but it was a general receivership under which he took possession of the Mascot Mining and Milling Company, Limited, of Idaho, and that upon judgment in that case the court so appointing him directed that he, as receiver, sell the property of the defendant corporation. As has been said before, the proper place to question the legality of the claims of Peter and the claims of Walther submitted to the state

court was in that particular court. The appellants had every opportunity in that case to litigate all of the questions involved in the present case and they were advised and knew of the pendency of that case, and it is the contention of the appellees herein that having failed to go in and contest any matter in the state court proceeding they cannot now go into the Federal Court as they have done and ask the Federal Court to set aside and vacate orders of the state court. And that the complainants are unable at this time to set aside the action of the state court in the appointment of the receiver and that the federal court is unable to make any order to oust the receiver of the state court action. The further contention as first expressed is that the state court receiver was the only party who could have instituted an action on behalf of the corporation such as the stockholders have attempted to do in this proceeding, and that having failed to request the state court for an order directing receiver to institute such action and having failed to make the demand upon the receiver to bring such action that they, as stockholders, have not come within the spirit of equity rule 27, in the bringing of such action.

At the time of the presentation of the defendants motions to dismiss, the court advised the attorneys representing the complainants that they should either have the receiver bring such action or show facts by way of pleading why the receiver would not bring the action in the place of the stockholders, but notwithstanding the court's suggestion equity case No. 263 was dismissed and equity case No. 307, which is for all intents and pur-

poses the same complaint as was filed in equity case 263, they made no attempt whatsoever to plead that the consent of the court or the consent of the receiver could not be had in bringing such action.

With the foregoing statements, it is desired to call the court's attention to some of the cases cited by the appellants in their brief now presented to the court. Much stress is laid in the opening of their brief on equity rule 27. We have no quarrel to find with the provisions of equity rule 27, or a case brought under such rule when the facts as plead bring the parties within the letter or spirit of said rule.

In the case of Ogden et al, vs. The Gild Edge Consolidated Mines Company, et al, 225 Federal, 723, cited in appellants brief was a case wherein a difficulty existed between the creditors and the directors of the corporation but nowhere in that case do the facts follow the facts in this action. No receiver had been appointed and the directors were still in charge of the corporation. The appellees contend that the cases are entirely dissimilar and that the rule of law applicable in the case of Ogden vs. The Gilt Edge Consolidated Mines Company, et al, is not applicable to the case before this court.

Without further comment upon each case individually cited and noted in appellants brief, a general statement may be made which in substance and fact will show that the cases are not similar to the case herein in question, but all of those cases comment upon the fact of disputes and differences between directors and stockholders with-

out the added element of a receivership. These cases too lay down the rule that where the complainants bring themselves within equity rule 27, they are entitled to proceed, but from the facts pleaded by the complainants and from facts as shown by the appellants' transcript of the record they have neither complied with equity rule 27 or plead facts which in the instant case would relieve them from so doing.

The relief asked for by the complainants in this case if recovered would be the assets of the defendant corporation and therefore a legal right. This being property of the corporation it would come into the hands of the receiver and would be such property as the receiver himself would be entitled to take into his possession.

In Tardy's Smith on Receivers, volume 1, article 2, page 5, a statement is given as to the office of the receiver, and that statement is as follows:

> "A receiver is a person appointed by the court as its representative, for the purpose of taking into his control, custody and management property which is the subject matter of or involved in litigation for the purpose of preserving it pending the ultimate determination of such litigation, when it appears to the court to be unreasonable that it should remain in possession of the litigants. He is regarded as an officer of the court appointing him and whatever he does under the orders of the court in respect to the property over which he is appointed receiver is the act of the court itself. His custody is that of the court and he can not act, save as he is directed by the court. He is very frequently characterized as the arm or hand of the court. Being an officer of the court and exercising his functions for the benefit of all the parties concerned

in the litigation, he is not to be regarded as an agent of either the plaintiff or defendant. He acts for the common benefit of all parties interested in the litigation. In view of his duties towards all parties to the litigation, he naturally should be a person who is impartial as between the litigants and parties interested in the outcome of the controversy. A receiver has also been characterized as a quasi trustee holding the fund for the benefit of whoever may eventually establish title to it."

The thought expressed in the above statement was approved by the Circuit Court of Appeals for the Eighth Circuit in the case of Ridge vs. Manker, et al., 132 Federal, 599, decided by that court on September 5th, 1904. On page 601, in the opinion of that court the court states:

"A receiver is an officer of the court appointing him. He is its immediate representative in the custody and administration of the property of which it has taken possession. His custody is the custody of the court. A suit against him is a suit against the receivership, and, except as authorized by statute, if instituted without permission of the court, is an unwarranted interference with the exercise of its exclusive jurisdction. A court having lawfully acquired the possession of property through the appointment of a receiver may reserve to itself the determination of all questions affecting it and pertinent to the proper administration thereof, or it may permit such questions to be judicially settled in other tribunals. Passing the statutory exceptions, no suit can be elsewhere maintained against the receiver without the permission of the court from which he derives his authority. Davis v. Gray, 16 Wall, 203, 217, 21 L. Ed. 447; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; McNulta v. Lockridge, 141 U. S. 327, 332, 12 Sup. Ct. 11, 35 L. Ed. 796;

Texas & Pac. Rail. Co. v. Cox, 145 U. S. 593; 12 Sup. Ct. 905, 36 L. Ed. 815; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; Farmers Loan & Trust Co. v. Railroad Co., 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667."

The Supreme Court of the State of Idaho in the case of Martin vs. Atchison, 2 Idaho 634, 33 Pac. 47, held that a receiver was an officer of the court, under the court's protection, and property coming into his hands as a receiver was in custodia legis and that no one could sue him without leave of the court responsible for his appointment.

In the case of McTamany vs. Day, et al, a case decided by the Supreme Court of the State of Idaho, 1912, and found in 128 Pac. 563, the plaintiff had brought an action as a creditor of an insolvent bank. At the time of bringing suit the bank was in the hands of a receiver. The suit by the plaintiff was brought against the directors of the bank to recover an indebtedness due from the bank to the plaintiff. The complaint alleged wrongful and fraudulent acts on the part of the directors. Demurrers were filed to the effect that it was the office or duty of the receiver in charge of said bank to prosecute a cause of action against the directors of the bank if there existed in favor of the creditors or the receiver any action for neglect or fraud and that it was the duty of the receiver, if a cause of action existed, to recover such money or assets of the bank for the benefit of creditors. In disposing of this question the Supreme Court of the State of Idaho on page 565 says:

"The Wallace State Bank is in the hands of a

receiver, and he is authorized to proceed and marshal and collect all of the assets of the bank, and distribute them pro rata among the creditors or as the court may direct. In Crandal v. Lincoln, 52 Conn. 73 action was in the receiver saying: 'To allow creditors to bring suits in such cases, unless possibly under peculiar circumstances, if practicable, would be highly inconvenient and contrary to the policy and spirit of the statute.' It is stated in the recent work of Tiffany on Banks and Banking, page 304 et seq., as follows: 'The officers being liable to the corporation for losses caused by their fraud, gross negligence, or wilful breach of duty, this liability may be enforced by or for the benefit of the creditors when the corporation becomes insolvent.' . . .It follows that the remedy of creditor is not by an action at law against the guilty officers. (Citing many authorities). . . Of course, where the corporation is in the hands of a receiver, or assignee, as the representative of all concerned, he is the proper party to maintain an action."

"If the bank has suffered loss on account of the directors having declared dividends contrary to the provisions of section 2981 Rev. Codes, or has suffered loss in consequence of the directors' fraud, gross negligence or wilful breach of duty, after such corporation is placed in the hands of a receiver, it is the duty of the receiver, as the representative of all concerned, to proceed and collect such illegal dividends and all other claims of such corporation due said bank by contract or caused by the fraud, gross negligence, or wilful breach of duty of the officers thereof, so that whatever may be recovered may be properly distributed among all of the creditors of the bank as the law or court may direct. See Tiffany on Banks and Banking, page 304, et seq."

The Supreme Court of Idaho in further comment on this case, on page 565 stated that:

"If the receiver fails or refuses to do his duty

> in this regard, that matter ought to be called to the attention of the court, and the court ought to compel him to do so or remove him. The trial court did not err in sustaining said demurrers and entering judgment of dismissal."

In case of Kelly v. Dolar, et al., 233 F. 635, decided by the Circuit Court of Appeals, Third Circuit, May 22nd, 1916, there was presented to that Court a case involving a stockholder's suit. The Bill of Complaint was filed in the United States District Court for the Eastern District of Pennsylvania, against certain directors of a corporation for which a receiver had been appointed by a New York State Court. It charged the defendants with failue to require the lessee to perform covenants of a lease, as well as a failure to have the lease renewed, in consequence of which the same was subsequently foreclosed, and that they had failed to require the payment of certain taxes. In discussing this case the Court said:

> "To our mind, three principal questions arise on this appeal: First, has the plaintiff shown his right to maintain this bill? Second, is the Pennsylvania Statute of Limitations a bar to his recovery? And, Third, is the action barred by laches? An answer adverse to the plaintiff on any one of these questions justifies an affirmance of the decree entered below."

In discussing the first of these questions presented the Court further said:

> "Turning to the first question, it is clear that the gravamen of the plaintiff's complaint is the negligence of the three defendant directors. That the negligence of a director is an injury to his corpora-

tion, and that the right to recover for such negligence is a legal as contrasted with an equitable right, and that the corporation is vested with the right to recover for such injury, is established by authority. In some cases the right is asserted in equity; in some, at law, according to circumstances; but in whatever form it is litigated the right to recover for negligence is a legal right. Loan Society vs. Eavenson, 241 Pa. 65, 88 Atl. 295; National Bank vs. Wade (C. C.) 84 Fed. 10; Cockrill vs. Cooper, 86 Fed. 7, 29 C. C. A. 529; Horn S. M. Co., vs. Ryan, 42 Minn. 196, 44 N. W. 56; Emerson vs. Gaither, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114."

"In this case, under the general principles of receiverships, and specifically by virtue of sections 232 and 239 of the General Corporation Law of New York, as amended by chapter 766 of the Laws of 1913, viz.:

> 'Sec. 232. Such receivers shall, from time of their having filed the security required by law, be vested with all the property, real or personal, vested or contingent, of the corporation.'
>
> 'Sec. 239. General Powers of Receivers. The said receivers shall have power: (1) To sue in their own names or otherwise, and recover all the property, debts and things in action, belonging or due or to become due to such corporation, whether accruing or maturing before or after the dissolution thereof, and whether vested or contingent at the time of such dissolution, in the same manner and with the like effect as such corporation might or could have done if no receivers had been appointed."

—this legal right of action against the directors for negligence was vested in the receiver on his appointment. Such being the case, the corporation originally, and the receiver on his appointment, being possessed of such legal right, and of the right to sue for its redress, how has this right been vested in

the plaintiff so as to enable him to maintain this action? Manifestly, he could not maintain a suit at law to assert a legal right vested in the receiver. If so, what gives him a right to resort to equity?

"Of course, where a corporation, through the fraud of those controlling it, refuses to bring suit against a director and redress a wrong, this calls into being an equitable right which equity will enforce on a stockholder's bill. Foss vs. Harbottle, 2 Hare 461. But, as said in that case:

> 'It was not, nor could it be successfully argued, that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law, the corporation, and the aggregate members of the corporation, are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which prima facie would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative.'

"No such state of facts here exists. The Central Company is not under the domination of its directors; there is no allegation of mala fide control on their part. On the contrary, the corporation has passed from their control into that of a court of competent jurisdiction, and that Court has on application declined to allow the receiver of such company to bring suit against the directors. Such being the case, it is manifest that the right of action of the corporation still remains in the corporation and its receiver, and forms part of the estate which that court is administering. To the present situation we may apply the language of the Supreme Court in Porter vs. Sabin, 149 U. S. 480, 13 Sup. Ct. 1008. 37 L. Ed. 815, namely:

> 'The right of action remains part of the estate of the corporation within the exclusive custody

and jurisdiction of the state court.'

"It is contended, however, that such court, while refusing to allow the receiver to sue, granted leave to the plaintiff stockholder to sue. But leave to sue went no further than permission to sue, and no order was made, even if such a thing were possible, purporting to assign to the stockholder the claim vested in the receiver, or to confer on the stockholder a right to enforce the legal right vested in the receiver.

"Such being the facts, the gist of the present controversy is: First, whether the plaintiff is vested with the legal right which he is attempting to enforce; and, second, if he is not vested with such legal right, has he shown such facts or circumstances as give him standing in a court of equity to enforce the legal right vested in the receiver? The answer to the first question is clear. The legal right, an action for damages for negligence is vested in the receiver. It has never been assigned to the plaintiff, and the law courts are open to the receiver to prosecute such claim. But the reasons which led the court to decline allowing its receiver to prosecute are that it is satisfied a suit at law was futile, because, it would be met by a complete defense. This appears in the answer to a petition praying for such direction, wherein the receiver said:

'I do not believe it is to be to the interest of the Central Park Co., or its stockholders that I maintain this action for several additional reasons, among them the fact, as I understand it, that if I were to maintain the action it would have to be one at law and more than 6 years have elapsed since either of the three gentlemen you mention ceased to be a director of the Central Park Company.'

"Indeed, no such facts, as under the principle of Foss vs. Harbottle, 2 Hare 461, and Hawes vs. Oakland, 104 U. S. 455, 26 L. Ed. 827, lead a court of equity to entertain a stockholder's bill and thus enforce rights of his corporation which would other-

> wise be lost, exist in the present instance. The simple fact is that the Court administering the affairs of the Central Company has declined to prosecute this claim by its receiver. Such being the case, it is quite clear that the Court, declining to have its receiver pursue a remedy open to it in a court of law, cannot, by allowing a stockholder to pursue such claim, call into exercise the powers of a court of equity whose exercise of jurisdiction in such cases is because the law is powerless to afford a remedy. It is manifest, therefore, that this stockholders' bill is without equitable foundation and the decree below is justified on that ground."

In the case of Kelly vs. Dolan et. al., 218 Fed. 966, the United States District Court for the Eastern District of Pennsylvania in discussing the situation where a receiver has been appointed for a corporation said:

> "Where a statutory receiver has been appointed for a corporation, neither the corporation, nor a stockholder, can maintain an action for alleged loss of the corporation's assets without the sanction of the Court appointing the receiver, but with such sanction a suit for the corporation's benefit may be brought in a foreign jurisdiction in which defendants can be served. (Syl. 5.)"

On page 968 of the opinion the Court gives the following:

> "Were there no receivers in the case, this plaintiff might maintain his bill upon the averment of demand made upon the corporation and its refusal to sue, and that the refusal was fraudulent and due to the control exercised over the managers of the corporation by the defendants. As, however, the affairs of the corporation are in the hands of a receiver, certain consequences result from this. These consequences, or at least some of them, differ ac-

cording to the character of the receivership. A chancery receiver is but the hand of the Court, which has taken over the administration of the affairs of the corporation. The corporation continues to be the owner of all that belongs to it. One effect of the interposition of the Court is to take from the corporation the control of its affairs. Another consequence is that it receives the protection of the Court against the interference of others. Within the jurisdiction of the Court appointing the receiver no action can be taken by the corporation or against it without the sanction of the Court. If anything is to be done by the corporation, it must be done through and by the receiver.''

This case last cited was appealed to the Circuit Court of Appeals for the Third Circuit and was sustained by the Circuit Court. See Kelly vs. Dolan et. al., 233 Fed. 635, 147 C. C. A. 443, set out at length herein.

In the case of Porter vs. Sabin, 149 U. S. 480, 13 Sup. Ct. 1008, 37 L. Ed. 815, a suit was brought, in equity, by plaintiffs as stockholders against the defendant. a former president of the corporation, and others, charging fraud on the part of the defendant, alleging the appointment of a receiver by a Court of the State of Minnesota, that the receiver had applied for an order to bring the action which was denied by the State Court, that the plaintiffs applied to the State Court for an order permitting the receiver to be made a party to the bill, that the Court denied the application as well as a further application then made by the plaintiffs to exclude from a contemplated order of sale then pending before it, the cause of action set out in the bill and all other actions which stockholders might maintain in right

of the corporation. It was alleged that the receivership proceedings were fraudulent. The defendants demurred to the bill for want of jurisdiction, because the State Court which appointed the receiver was the only Court having jurisdiction in the premises; for want of equity; because the receiver was a necessary party. In an opinion by Mr. Justice Gray, the Court says:

> "The grounds on which they attempt to maintain this suit are that the court which appointed the receiver has denied his petition for authority to bring it, as well as an application of the plaintiffs for leave to make him a party to this bill.
>
> "Their position rests on a misunderstanding of the nature of the office and duties of a receiver appointed by a court exercising chancery powers, and of the extent of the jurisdiction and authority of the court itself.
>
> "In Brinckerhoff vs. Bostwick, 88 N. Y. 52, and Ackerman vs. Halsey, 10 Stewart (37 N. J. Eq.) 356. cited for the plaintiffs, in which stockholders of a national bank were permitted to bring such a suit when a receiver had refused to bring it, the receiver was not appointed by a judicial tribunal, but by the Comptroller of Currency, an executive officer.
>
> "When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the Court assumes the administration of the estate; the possession of the receiver is the possession of the Court; and the Court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the Court shall ultimately adjudge to be entitled to it. Wiswall vs. Sampson, 14 How. 52, 65; Peale vs. Phipps, 14 How. 368, 374; Booth vs. Clark, 17 How. 322, 331; Union Bank vs. Kansas City Bank, 136 U. S.

223; Thompson vs. Phoenix Ins. Co., 136 U. S. 287, 297.

"It is for that Court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation, the Court may permit to be put in suit in another tribunal against the receiver or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the Court which appointed him. Barton vs. Barbour, 104 U. S. 126; Texas & Pacific Railway vs. Cox, 145 U. S. 593, 601.

"The reasons are yet stronger for not allowing a suit against a receiver appointed by a State Court to be maintained, or the administration by that Court of the estate in the receiver's hands to be interfered with, by a Court of the United States, deriving its authority from another government, though exercising jurisdiction over the same territory. The whole property of the corporation within the jurisdiction of the Court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that Court, remains in its custody, to be administered and distributed by it. Until the administration of the estate has been completed and the receivership terminated, no Court of the one government can by collateral suit assume to deal with rights of property or action, constituting part of the estate within the exclusive jurisdiction and control of the Courts of the other. Wiswall vs. Sampson. Peale vs. Phipps and Barton vs. Barbour, above cited; Williams vs. Benedict, 8 How. 107; Pulliam vs. Osborne, 17 How. 471, 475; People's Bank vs.

Calhoum, 102 U. S. 256; Heidritter vs. Elizabeth Oil Cloth Co., 112 U. S. 294; In re Tyler, ante, 164.

"The State Court, upon further hearing or information, may hereafter reconsider its former orders, so far as no rights have been lawfully vested under them, and may permit its receiver to sue or be sued upon any controverted claim. But should it prefer not to do so, the right of action of the corporation against its delinquent officers, like other property and rights of the corporation, will remain within the exclusive jurisdiction of that Court, so long as the receivership exists."

Upon the law as expressed by the Courts to which reference is made in this brief, it is urged that the action of the United States District Court for the District of Idaho in dismissing the bill of complaint upon the motions presented by the appellees, The Mascot Mining and Milling Company, Limited, of Idaho, and the appellee J. M. Stevens was right, and that the Court committed no error, and that this Court should affirm the judgment of the lower Court and approve the dismissal of said action.

Respectfully submitted,

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Solicitors for Appellees.